UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

IVY HILL SNF, LLC
Employer

and **Case 04-RC-167699**

DISTRICT 1199C, NATIONAL UNION OF HOSPTIAL AND HEALTH CARE EMPLOYEES, AFSCME, AFL-CIO
Petitioner

EMPLOYER'S REQUEST FOR REVIEW OF ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION DATED FEBRUARY 8, 2016

I. BACKGROUND

On January 14, 2016, the Petitioner ("1199" or "Union") filed the petition in Case 04-RC-167699 seeking to be certified as the exclusive bargaining representative for all full-time and regular part-time licensed practical nurses ("LPN's") employed by the Employer ("Ivy Hill"). On January 27, 2016, a hearing was held before Hearing Office Joshua Rosenberg. At the hearing, the Employer took the position that all the petitioned-for LPN's are statutory supervisors because they discipline and/or effectively recommend discipline with respect to the Employer's Certified Nurse Aides ("Aides"). The parties stipulated that LPN's

who are employed PRN were included in the proposed bargaining unit. 1199 argued that all these petitioned-for LPN's are not supervisors within the meaning of Section 2(11) of the Act; and, the Acting Regional Director (the Regional Director recused himself) determined in his February 8, 2016 Decision and Direction of Election that these petitioned-for LPN's were employees under the Act and ordered an election be held for them. The election, held on February 16, 2016, resulted in a majority of eligible voters voting for union representation.

II. **BASIS FOR SEEKING REVIEW**

Review is appropriate in this case because it involves substantial questions of law because the Acting Regional Director has disregarded relevant credible and admitted evidence, while relying on uncorroborated hearsay, such that his Decision is not supported by the Record viewed as a whole, *see:* Lakeland Health Care Associates, LLC v. NLRB, 696 F.3d 1332, 1337 (11th Cir. 2012) (vacating Board's decision and denying enforcement, noting disregard of relevant evidence concerning supervisor indicia); and, is inconsistent with established Board precedent as reflected in the Board's concession on the record in NLRB v. New Vista Nursing and Rehabilitation, LLC, Case Nos. 11-3440, 12-1027, 12-1936 (3rd Cir. awaiting supplemental briefing and oral argument), NLRB Brief at page 22, that supervisory status under Section 2(11) of the NLRA requires only the

possession of the authority to discipline, not its actual exercise, *Accord*: Lakeland Health Care Associates, LLC v. NLRB, 696 F.3d 1332, 1338 (11th Cir. 2012), *citing* Caremore, Inc. v. NLRB, 129 F.3d 365, 369 (6th Cir. 1997); *see also:* NLRB v. Leland-Gifford Co., 200 F.2d 620, 625 (1st Cir. 1953) (§ 152(11) does not require exercise of the types of authority). In this case, the Union's own LPN's witness (LPN Bolt) admitted that she signed and understood her job description to include her authority to discipline; that she expressly advised Certified Nurse Aides under her supervision that they would be written up if they did not do what she required; that she did write up a Certified Nurse Aide who failed to comply with that directive as per the Employee Handbook; and, that, after writing her up, she discussed the write up with the Certified Nurse Aide before giving the form for further processing to the LPN's supervisor (Tr. 96-108). The Decision failed to consider this testimony, as well as relevant portions of admitted Job Description relating to the role LPN's play in the Employer's progressive discipline process. The Union's other LPN witness (LPN Regusters), in response to the Hearing Officer, about who can fill out discipline reports, testified (Tr. 122): "Whoever is in direct contact like with the CNA, which would be us, LPNs. Most of that time, that would be us, because we're next in line to --- I will say LPNs." The Decision fails to consider this testimony as well.

The Acting Regional Director's effort to distinguish the precedent relied on by the Employer did not take into consideration admitted testimony by the Union's own LPN witness that established LPN's authority to discipline and effectively recommend discipline, while instead relying on uncorroborated hearsay in violation of the Board's expressed limitations on the use of hearsay testimony in its proceedings. *See:* RJR Communications, Inc., 248 NLRB 920, 921 (1980), also cited in ALJ Decision in Ralphs Grocery Co., 360 NLRB No. 65 (2014)(hearsay admissible if rationally probative in force and if corroborated by something more than the slightest amount of evidence); *see also:* Helena Labs. Corp., 219 NLRB No. 140 (1975) (Uncorroborated hearsay that is explicitly denied by direct evidence does not comprise sufficient affirmative probative evidence); Intern'l. Union of Operating Engineers, Local #4, 268 NLRB No. 185 at 1228 (1984) (Double hearsay too insubstantial to support necessary finding). Here, the hearsay and double hearsay testimony relied on by the Acting Director (testimony of Janet Bolt at Tr. 90 about what her sister told her about another discipline case; testimony of Trifinia Regusters at Tr. 2120 about a conversation with another employee about her discipline results) was uncorroborated by any evidence and inconsistent with the documentary evidence admitted into the Record; and, therefore should not have been relied upon in the Decision. LPN Regusters

testified that she was not an LPN imposing discipline in either of the cases where her signature is found (Tr. 126). For these reasons, review is appropriate and necessary, since the record, when viewed as a whole, including the direct testimony of the Union's own witnesses, confirms that Ivy Hill's LPN's possess the authority to discipline and to effectively recommend discipline for the reasons states by the 11th Circuit in Lakeland and under the Board's precedents as discussed in the parties' briefs in New Vista. The Decision's determination, at page 8, that: "the record does not establish that the LPN's have the authority to discipline employees" is not supported by substantial evidence and is the result of the Acting Director's misapplication of Board precedent resulting from his failure to consider relevant evidence and his reliance on uncorroborated hearsay. The Board should therefore vacate the Decision and dismiss the petition.

III. FACTUAL BACKGROUND

The Record in this matter, in addition to the Board Exhibits, consists of the testimony of two (2) LPN's working at Ivy Hill (LPN Bolt and LPN Regusters), Ivy Hill's HR Director (Sue Stoduto), and Ivy Hill's Director of Nursing (Sandy Amaker), along with the Collective Bargaining Agreement (Exhibit E-1); the current Employee Handbook (Exhibit E-2(a)); the prior version of the Employee Handbook used by Ivy Hill (Exhibit E-2(b); the 25 LPN's signed Job Descriptions

(Exhibit E-3); a compilation of 28 disciplinary actions (from 2008-2016) and 12 counseling/education forms (from 2010-2015) imposed on Certified Nurse Aides by Ivy Hill LPN's (Exhibit E-4); and, LPN Bolt's copy of her signed Job Description (Exhibit P-1). All of these Exhibits were received in evidence.

There was no dispute that under the current CBA, the Charge Nurse (LPNs) are excluded from the bargaining unit (Exhibit E-1 at Section 1(b), page 3). There was no dispute, as recognized by the Decision at page 4, that the CBA reserves as Management Rights, at page 39, the right to reprimand, suspend, discharge or otherwise discipline employees for cause and to determine the number of employees and the duties to be performed.

The issue before the Hearing Officer (Tr.13-14) was "whether LPN's are statutory supervisors by virtue of their ability to discipline or effectively recommend discipline." The Decision states at page 1 that it focuses exclusively on their "authority as it pertains to discipline."

The Decision summarizes Ivy Hill's operational structure on page 2. The Decision summarizes the test established by the Supreme Court of the United States to determine, pursuant to Section 2(11) of the NLRA whether an individual is a "supervisor." The Decision determined, at page 8, that the Record does not establish that the LPN's have the authority to discipline employees. The Decision made no determination as to whether they have the authority to effectively

recommend discipline, but states, at page 5, that there is "no evidence that any LPN ever independently recommended discipline or discharge."

The Job Descriptions (Exhibit E-3), signed by all of the LPN's, and by each of the LPN witnesses, under the heading "Charge Nurse (LPN)", include the following statements:

> **Purpose of Your Job Position.** The primary purpose of your position is to…supervise the day-to-day nursing activities performed by CNAs…and other nursing personnel. To monitor the performance of CNAs…provide education and counseling, perform disciplinary action as necessary, and complete performance evaluations.
>
> **Delegation of Authority. As Charge Nurse (LPN)** you are delegated the administrative authority, responsibility, and accountability necessary for carrying out your assigned duties.
>
> **Duties and Responsibilities. Administrative Functions**
> Provide discipline and evaluations of assigned CNAs….
> Issue verbal and written disciplinary warnings to assigned CNAs
>
> **Personnel Functions**
> Provide leadership, education, counseling, and discipline, when appropriate, to assigned CNAs….
> Evaluate daily performance of assigned CNAs…. Document any disciplinary issues and report problem areas or disciplinary actions to the Nurse Supervisor and/or Unit Manager.
>
> **Specific Requirements**
> Must be able to evaluate the performance, initiate disciplinary actions, and prepare and complete performance evaluations for personnel.

Each LPN signed the Job Description which includes an Acknowledgment, stating in pertinent part: "I have read this job description and fully understand that the requirements set forth therein have been determined to be essential to this position." The Decision made no finding that the Job Descriptions do not reflect Ivy Hill's express intention to employ each LPN's as a **supervisor** with respect to Ivy Hill's CNA employees and to vest them with the authority and responsibility to discipline such employees. *See:* Section 2(3) of the NLRA, definition of employee, as someone who is not employed as a supervisor. Ivy Hill's Director of Nursing, the head of the nursing department at Ivy Hill (Tr. 79), testified (Tr. 77) that the LPN's are the immediate supervisors of the CNAs and (Tr. 79) the LPNs are responsible for filling out the discipline forms "if they see fit."

Ivy Hill's HR Director testified (Tr. 18) that she checks the box on each job description that states that it is a "supervisory position" because the LPN's have the right to supervise the CNAs. The HR Directed testified (Tr. 20) that she was familiar with the kinds of disciplines that the Ivy Hill LPN's perform. She testified (Tr. 21) that the "verbal discipline" issued by LPN's pursuant to their Job Description is a "step before a written discipline," in Ivy Hill's progressive discipline system as described in the Employee Handbook. She testified (Tr. 22-

23) that, under Ivy Hill's progressive discipline system: "if an employee is disciplined for a Group I offense by an LPN, the first step would be a verbal warning. And if they had another Group I offense, then it would go to a written. And then progressively a third would be a final, a fourth a termination."

As recognized by the Decision at page 4, Ivy Hill established policies and procedures related to employee discipline in its Employee Handbooks. The Employee Handbook, at page 58, expressly requires Management involvement, discretion and investigative techniques to determine if **discharge** (i.e., termination of employment) is warranted. Therefore, Management involvement is required by the Employee Handbook for each level of offense for which Termination of Employment is the stated penalty (Exhibit E-2(a) at pages 54-55, as well as any where Management determines to accelerate the progressive discipline process to discharge an employee. Management involvement is not required by the Employee Handbook for the imposition of lower level penalties. LPN's do not have the authority in their Job Descriptions, as clarified in the Employee Handbook and the HR Director (Tr. 23, 33), to discharge an employee. They have the authority, as expressly stated in their Job Descriptions, to issue verbal and written disciplinary warnings to assigned CNAs, when appropriate in situations that they determine should not be resolved through the use of

counseling/education forms, to document such disciplinary issues and to report their disciplinary actions to their own supervisors. All disciplinary actions are processed in part by the HR Director (Tr. 23) and reported to the Director of Nursing (Tr. 23). The HR Director testified (Tr. 23) that the LPNs "issue the discipline." The HR Director testified (Tr. 32) that the issuing of a verbal discipline 'starts the discipline process" in an employee's file; and, if progressive discipline comes after that, then it would be the next step, depending on which Group of offenses is involved.

The HR Director testified (Tr. 24-25, 32) that the LPN has discretion to determine whether to use an education/counseling form (which is not a discipline form) instead of imposing discipline using a discipline form. She testified (Tr. 25) that the format of the discipline form changed in order to assure that the discipline was "delivered in a timely fashion." She testified (Tr. 26) that, whether under the prior format or the present one, LPNs would need to get information from her HR file in order to determine which penalty level was appropriate under Ivy Hill's progressive discipline system because her files were the only repository of prior disciplines. The HR Director testified (Tr. 33) that the issuance of a verbal warning and the issues of a written warning are forms of progressive discipline in Ivy Hill's progressive discipline system. Ivy Hill's HR Director testified (Tr. 39) that

the filing of such disciplinary forms results in discipline and is used as evidence in the employee's personnel file that discipline has been implemented as to that employee. She testified (Tr. 42) that the purpose of the discipline report form is to result in discipline. The Decision found, at page 4, that the discipline forms are available at the nursing stations on each floor at Ivy Hill. The Decision found, at page 5, that the LPN's have been instructed not to fill out the section of the discipline form indicating Level of Office and that they sign the forms.

With respect to the first disciplinary form in Exhibit E-4, Ivy Hill's HR Director testified (Tr. 28, 38) that the individual signing the form as the supervisor was LPN Monir Greene and that there was no requirement that the form be signed by Ivy Hill's Administrator for it to become part of the CNA employee's discipline file. She testified (Tr. 28-29) that the discipline form for November 19, 2015 in Exhibit E-4, also with an Administrator's signature, was signed by LPN Marie Dorval and that the HR Director did not sign because she was not present for this discipline.

Ivy Hill's HR Director testified (Tr. 29) that the disciplinary form for August 20, 2015 was signed by LPN Janet Bolt, as the supervisor, without any signature by the Administrator or the HR Director. The HR Director testified (Tr. 29-30) as to the disciplinary form for May 29, 2015 that the LPN Supervisor, Jamila Tanner

signed on the wrong line, and that the RN Supervisor also signed the form. She testified (Tr. 30) that the discipline form for February 17, 2015 was signed by LPN Gwen Harris; (Tr 31) that the discipline form for January 31, 2015 was signed by LPN Noella Bolt as well as by the Director of Nursing; (Tr. 31) that the discipline form for January 23, 2015 was signed by LPN Janet Bolt.

The Decision found, at page 5, that the discipline forms in Exhibit E-4 include two (2) for Group III offenses (for which termination in the penalty under the Employee Handbook); six (6) were for Group II offenses; and, the rest for Group I offenses, including thirteen (13) with verbal warnings and eight (8) with written warning, as well as some with no level of discipline indicated on the form.

The Decision found, at page 7, that: "When LPNs observe rules infractions by CNAs, they prepare disciplinary reports, but they do not decide on the level of discipline. The Decision states as page 7 that: "The record shows that in deciding on discipline, the officials who review LPN reports have not always followed the disciplinary steps set forth in the Handbook policy, but have repeatedly deviated from these guidelines, but does not cite to anywhere in the record this is in evidence. Ivy Hill submits that this conclusion is not supported by substantial evidence in the record. The Decision includes no analysis of any hearsay

testimony relied on by the Acting Regional Director to determine whether it is probative, corroborated or contradicted by other evidence.

With respect to the imposition of discipline by an LPN, LPN Bolt signed the discipline form in Exhibit E-4 relating to August 20, 2015 (Tr. 29,). On the form, LPN Bolt stated and wrote (Tr. 98) that she advised her CNAs "at the beginning of the shift that disciplinary action will occur for anyone that is not on time for dining room duty." LPN Bolt testified (Tr. 88) that she fills out that part of the form and then gives it to the unit manager or nursing supervisor, but was told not to complete the top portion of the form "for the simple fact that we don't have access to the files, we don't know what the current action, what they were in trouble for before, or there's no way for us to know that." LPN Bolt testified (Tr. 89) that, when she initially fills out the form, she discusses what she's written with the CNA, after which the CNA agrees or disagrees to sign the form, after which LPN Bolt hands the form over to her supervisor. LPN testified (Tr. 96) that she read her Job Description and she understood that issuing verbal and written disciplinary warnings were part of her job. LPN Bolt testified (Tr. 98) that "writing up" a CNA means filling out her part of a disciplinary report form. LPN Bolt testified (Tr. 99) that she is the one who goes to her unit manager with the suggestion that somebody should be "written up." LPN Bolt testified (Tr. 102)

that, after her CNA failed to comply on August 20, 2015, she went to her unit manager and said "should I write her up" and the reply was "yes, write her up," after which LPN Bolt went to get the discipline form and filled out her portion. LPN Bolt testified (Tr. 107-108) that she determined that there should be a write-up, she told the employee before the offense happened that if she didn't comply with a specific directive she would be written up, according to the Employee Handbook. LPN Bolt testified that she uses the Employee Handbook to guide whether to fill out an employee discipline report or a counseling report, unless there is a question of resident abuse.

LPN Regusters was not an LPN involved in imposing any of the disciplines involved in this matter. She was a Union witness for two (2) of them (January 23, 2011 and November 27, 2010) (Tr. 122). She was not employed as an LPN at Ivy Hill until March 21, 2011 (Tr.124 and Exhibit E-3 –her Job Description).

IV. ARGUMENT

In NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 714-715, 121 S.Ct. 1861, 1867-1868 (2001), the Supreme Court of the United noted that Board errors in interpreting the statutory definition of "supervisor" preclude enforcement of the Board's order. In the Court of Appeals decision in Kentucky River Community Care, Inc. v. NLRB, 193 F.3d 444, 454 (6th Cir. 1999), *aff'd.* 532

U.S. 706, 121 S.Ct. 1861 (2001), the Sixth Circuit stated that it has continued to overturn NLRB decisions finding that nurses are not supervisors even though the nurses direct others in providing patient care, address scheduling shortages, and have an evaluative role with respect to other employees, *citing* Allentown Mack Sales & Service v. NLRB, 522 U.S. 359, 118 S.Ct. 818 (1998), and criticizing the NLRB recurring revisions of previously stated interpretations of § 152(11) to impose a more stringent definition or a higher standard of compliance in certain factual contexts after the fact, such that Chevron deference was inappropriate. The problem identified in Allentown Mack Sales & Services v. NLRB and by the Sixth Circuit in Kentucky River is presented by the Decision in this case.

The existence of LPN authority is supported by the testimony of Ivy Hill's Director of Nursing and HR Director, by the testimony of LPN Bolt (a Union witness), by written records of LPN involvement in the disciplinary process, by the LPN's job descriptions, and by Ivy Hill's Employee Handbook's progressive discipline policies. The Decision cannot write off such indicia based by ignoring their existence in its analysis and by relying on uncorroborated hearsay instead, where, as here, there is evidence that such authority exists and has been exercised. *See:* Lakeland Health Care Associates, LLC v. NLRB, 696 F.3d 1332 (11th Cir. 2012).

The Decision's effort to distinguish Lakeland Health Care Associates, LLC, relied on by Ivy Hill at the Hearing, fails to discuss the 11th Circuit's filing that the LPN's role in initiating disciplinary actions separately supported their supervisory status where the findings became part of the employee's personnel file and, pursuant to the terms of the Employee Handbook, employees with "four active level one coaching plans will be terminated," 696 F.3d at 1341. The Record in this case as to Ivy Hill's progressive discipline system requires the same result.

The Decision's effort to distinguish Oak Park Nursing Care Center, 351 NLRB 27 (2007), is equally unavailing because of the Decision's failure to consider the record as a whole. In Oak Park, at pages 27-30, the Board expressly found that employee counseling forms that were sent to the Administrator for review; that were subject to determinations by the Director of Nursing or the Assistant Director of Nursing as to the "type of disciplinary action that needs to be taken against the employee"; that were subject to conferences with the employee and the LPN conducted by the Director of Nursing; and, that were placed by the Director of Nursing in the employee's personnel file, were sufficient evidence of the LPN's supervisory status because such forms constitute disciplinary action in that they provide "a foundation for future disciplinary action against the employee." *Id.* at page 28 FN4. They do the same under Ivy Hill's Employee Handbook under similar circumstances.

The Board has expressly limited reliance on uncorroborated hearsay in its decisions. *See:* RJR Communications, Inc., 248 NLRB 920, 921 (1980), also cited in ALJ Decision in Ralphs Grocery Co., 360 NLRB No. 65 (2014)(hearsay admissible if rationally probative in force and if corroborated by something more than the slightest amount of evidence); *see also:* Helena Labs. Corp., 219 NLRB No. 140 (1975) (Uncorroborated hearsay that is explicitly denied by direct evidence does not comprise sufficient affirmative probative evidence); Intern'l. Union of Operating Engineers, Local #4, 268 NLRB No. 185 at 1228 (1984) (Double hearsay too insubstantial to support necessary finding). The Decision in this case plainly relies on the uncorroborated hearsay in the testimony of LPN Bolt and LPN Regusters and incorporated it into the reasoning on which its legal conclusions are based. The Decision does not analyze the hearsay testimony on which it relies for its probative value, to determine whether it is corroborated in the Record or whether it is contradicted in the Record. Mere uncorroborated hearsay is not substantial evidence that can support the Decision. TRW-United Greenfield Div. v. NLRB, 716 F.2d 1391, 1394 (11th Cir. 1983), *citing* Consolidated Edison Co. v. NLRB, 305 U.S. 197, 217 (1938); NLRB v. Imparato Stevedoring Corp., 250 F.2d 297, 302 (3rd Cir. 1957) (same).

The Decision ignores the testimony of LPN Bolt that she effectively recommended the discipline (a "write up") be imposed on August 20, 2015. She

advised her CNAs that they would be disciplined if they did not comply with her directives and, when one of them did not, she brought the question of writing up the employee to her supervisor who confirmed that the CNA should be written up. The CNA was then written up by LPN Bolt on Ivy Hill's discipline form and that discipline form was forwarded for processing to Ivy Hill's HR Director and then became part of the CNA's personnel file. That is all that is required, along with the other indicia admitted into the Record, to prove that LPN's have the authority to effectively recommend discipline. Glenmark Associates, Inc. v. NLRB, 147 F.3d 333, 342-343 (4th Cir. 1998), *citing* NLRB v. Yeshiva Univ., 444 U.S. 672, 683 n.17 (1980); Extendicare Health Services, Inc. v. NLRB, 182 Fed.Appx. 412 (6th Cir. 2006).

V. CONCLUSION

Based on the foregoing, the Acting Regional Director erred in finding the petitioned-for LPN's were not statutory supervisors as defined by Section 2(11) of the Act and in ordering an election instead of dismissing the petition. Accordingly, the Employer requests that his February 8, 2016 decision be reversed and the petition dismissed.

Respectfully submitted,

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DATE: February 21, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21st day of February 2016, a true and correct copy of the foregoing EMPLOYER'S REQUEST FOR REVIEW OF ACTING REGIONAL DIRECTOR'S DECISION OF February 8, 2016 was served on the following by the method designated:

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DATE: February 21, 2016